Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-3461

DONALD SCHANBARGER,

Petitioner,

v.

ROBERT KELLOGG and PETER COOPER,

Respondents.

# PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION OF THE THIRD JUDICIAL DEPARTMENT OR THE NEW YORK STATE COURT OF APPEALS

DONALD SCHANBARGER
Petitioner Pro Se

Salem, New York 12865

August 15, 1975

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION OF THE THIRD JUDICIAL DEPARTMENT OR THE NEW YORK STATE COURT OF APPEALS

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The petitioner Donald Schanbarger respectfully prays that a writ of certiorari issue to review the opinion and order of the New York State Supreme Court, Appellate Division of the Third Judicial Department entered in this proceeding on February 27, 1874, or the opinion and remittitur of the New York State Court of Appeals entered in this proceeding on July 16, 1975.



BEST COPY AVAILABLE

## OPINION BELOW

N.Y.S. Court of Appeals, not yet reported, appears in the Appendix 16-26 hereto. Appellate Division of the N.Y.S. Supreme Court, reported as 43 AD 2d 362, 352 NYS 2d 50, appears in the App. 7-13 hereto. N.Y.S. Supreme Court is not reported, appears in the App. 1-4 hereto.

## JURISDICTION

The remittitur of the New York State Court of Appeals was entered on July 10, 1975, exhausting petitioner's State remedies with appeal dismissed. The February 27, 1974 Order of the Appellate Division of the N.Y.S. Supreme Court was appealed by the petitioner with February 28, 1974 and March 1, 1974 Notices of Appeal to the N.Y.S. Court of Appeals timely served and filed. It is for this Court to make an independant judgment (e.g. CRAMP v. BOARD OF PUBLIC INSTRUCTION, 368 US 978) whether assert rights under the U.S. Constitution, 14th amendment, Sec. 1., prohibited state conduct, due process and equal protection clauses, and 10th, individual rights clause; and generally in the N.Y.S. CPLR, Rule 4511's Judicial Notice of Law by brief only and Rule 4511 with questions before trial and at each court thereafter, this Court has effective jurisdiction, and/or mere evasin of this Court's jurisdiction (e.g. ROGERS v. ALABAMA, 192 U.S. 226, 230-231). This petition for certiorari was filed within 90 days of the said remittitur of the N.Y.S. Court of Appeals. This Court's jurisdiction is invoked under U.S. Constitution's Article 3, Sec. 2. and 28 U.S.C. Sec. 1257(3) for "correct decision" as under TENNESSEE v. DAVIS, 100 US 257, 264 (1880).



## QUESTIONS PRESENTED

1. Whether denial of a judgment by a state court, to one injured by state agents, is repugnant to the United States Constitution, within the meaning of Amendents, 14th, Section 1., prohibited state conduct, equal protection and due process clausces, and the 10th, personal rights clause, when the injured party shows a presumption that the state agents within the course of there employment, knowingly commited acts prohibited by the United States Constitution, 14th Amendment, Section 1. of the prohibited state conduct, equal protection and due process clauses, and the 10th Amendment, personal rights clauses.

2. Whether a state court finding a degree of contributory negligence against a plaintiff for recalcitrance and/or selected prevailing criminal defence, is repugnant to the United States Constitution, within the meaning of Amendments, 14th, Section 1., prohibited state conduct, equal protection and due process clauses and 10th, individual right clause, when plaintiff was recalcitrant in answering questions for possible criminal charge(s) and/or selected cheap safe prevailing defence.

3. Whether a substantial difference in judgments against a state or state agents, and parties not a state or state agents, is repugnant to the United States Constitution, within the meaning of Amendments, 14th, Section 1., prohibited state conduct, equal protection and due process clauses, and the 10th, personal rights clause, when state courts award lower judgments against the state or state agents, for there acts prohibited dy the United States Constitution, then against others not a state or state agents whoes acts are not prohibited by the United States Constitution, 14th Amendment, Section 1. of the prohibited state conduct, equal protection and due process clauses, and the 10th Amendment, personal rights clauses.

4. Whether a New York State court failing to take judical notice of constitutions and public statutes of the United States and New York State, is repugnant to the United States Constitu tion, within the meaning of the 14th Amendment, Section 1., prohibited state conduct, equal protection and due process clauses, when every court shall take judical notice without request of constitutions and public statutes of the United States and of every state of the United States under New York State Civil Practice Law and Rules Section 4511 (a).

## STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

Donald Schanbarger specifically asserts rights under the United States Constitution, 14th amendment, Section 1., prohibited state conduct, due process and equal protection clauses, and 10th, individual right clause; and generally in the New York State Civil Practice Law and Rules, Rule 4511, Judicial notice of law.

**(a) When judicial notice shall be taken without request.** Every court shall take judicial notice without request of the common law, constitutions and public statutes of the United States and of every state, territorty and jurisdiction of the United States and of the official compilation of codes, rules and regulations of the State except those that relate solely to the organization or internal management of an agency of the state and all local laws and county acts.

**(b) When judicial notice may be taken without request; when it shall be taken on request.** Every court may take judicial notice witout request of private acts and resolutions of the congress of the United States and of the legislature of the state; ordinances and regulations of officers, agencies or governmental subdivisions of the state or of the United States; and the laws of foreign countries or their political subdivisions. Judicial notice shall be taken of matters specified in this subdivision if a party requests it, furnishes the court sufficient information to enable it to comply with the request, and has given each adverse party notice of his intention to request it. Notice shall be given in the pleadings or prior to the presentation of any evidence at the trial, but a court may require or permit other notice.

(c) Determination by court; review as to matter of law. Whether a matter is judicially noticed or proof is taken, every matter specified in this section shall be determined by the judge or referee, and included in his findings or charged to the jury. Such findings or charge shall be subject to review on appeal as a finding or charge on a matter of law.

(d) Evidence to be received on matter to be judicially noticed. In considering whether a matter of law should be judicially noticed and in determining the matter of law to be judicially noticed, the court may consider any testimony, document, information or argument on the subject, whether offered by a party or discovered through its own research. Whether or not judicial notice is taken, a printed copy of a statute or other written law or a proclamation, edict, decree or ordinance by an executive contained in a book or publication, purporting to have been published by a government or commonly admitted as evidence of the existing law in the judicial tribunals of the jurisdiction where it is in force, is prima facie evidence of such law and the unwritten or common law of a jurisdiction may be proved by witnesses or printed reports of cases of the courts of the jurisdiction.

## STATEMENT OF CASE

Donald Schanbarger was walking along route 9 & 20 in East Greenbush, New York, April 30, 1968, when he was arrested and search by Robert Kellogg, with the assistance of Peter Cooper, both of which were on duty as New York State Troopers, for refusing to supply information about his business. After being charge with loitering under New York State Penal Law Sec. 340.35 (6), he was released on $20. bail. First trial date was postoned for the purpose of a psychiatric examination by the Rensselaer County District Attorney's office, as a "preliminary step" in connection with the trial. The pretrial examination was conducted on May 22, 1968. Thereafter a trial was held in Justice's Court, and he was found guilty and fined $10. Upon appeal, the New York State Court of Appeals held in April, 1969, that the information which he was tried on was insufficient; that the testimony of the trial was insufficient; and the judgment was reversed, and the information dismissed. (N.Y. v Schanbarger, 24 NY 2d 288)

Donald Schanbarger's complaint for pain, expense and invasion of privacy damages, demands $50,000 (par. 21) for illegal search and imprisonment, and $150,000 (par. 22) examplary and puntive damages; $40,000 (par. 31) for malicious prosecution, and $120,000 (par. 32) exemplary and puntive damages against Robert Kellogg and Peter Cooper; and $3,000 (par. 43) for psychiatric examination and $20,000 (par. 44) examplary and punitive damages against Robert Kellogg. It is alleged that there was a

conspiracy (par. 19, 24, 28, 29 & 41) to deprive plaintiff of rights (par. 37) thru abuse or perversion of process (par. 14). The defences of Robert Kellogg and Peter Cooper are assorted good faith (answer par. 12-4) and contributory negligence (answer par. 15-7).

This case has been dismissed as against David Garvey and Fredric Morgenstern by the New York State judiciary on grounds of quasijudicial immunity of a District Attorney. (Schanbarger v Kellogg et al., 351 NYS 2d 222)

The trial of the case was without a jury by the N.Y.S. Supreme Court, which dismissed the case as against Peter Cooper totally and parcelly as against Robert Kellogg, rendering judgment against him on one cause of action, that being $5,000 for false arrest. Such order of the trial court was affirmed by the App. Div. of the N.Y.S. Surpreme Court and the N.Y.S. Court of Appeals.



## REASONS FOR GRANTING THE WRIT UNDER THE 10th & 14th AMENDMENTS OF THE FEDERAL CONSTITUTION

1. To establish that each trooper, Peter Cooper and Robert Kellogg on joint patrol have joint liability when no one displays a act to disclaim association for illegal acts conducted.

2. To establish that remedies of Wolf v Colorado, 338 US 25 are floors of judgments awarded by courts without a jury.

3. To establish that police must suffer a judgment of at least the damage caused by police.

4. To establish that judgments against police by state a court without a jury may not be less then such a case against non police.

5. To establish that a state court that renders a judgment without a jury, must include noticable punitive and exemplary damages against police.

6. To establish that state courts must take judicial notice of laws and the Federal Constitution without request, and/or must respond to federal Constitutional claims or questions of assurter notwithstanding how raised in court of first insance and/or at each court at any time.

## C O N C L U S I O N

For these reasons, a writ of certiorari should issue to rewiew the order and opinion of the Appellate Division of the Third Judicial Department of the New York State Supreme Court or the New York State Court of Appeals.

Respectfully submitted,

DONALD SCHANBARGER
Petitioner Pro Se
Salem, New York 12865

August 15, 1975



STATE OF NEW YORK
SUPREME COURT RENSSELAER COUNTY
**********

DONALD SCHANBARGER,
Plaintiff,

-against-

ROBERT KELLOGG and PETER COOPER,
Defendants.
**********

(Supreme Court Rensselaer County Trial Term, November 1972.)
(Hon. De Forest C. Pitt, Presiding)

APPEARANCES: DONALD SCHANBARGER, Plaintiff. Pro Se.

LOUIS J. LEFKOWITZ, ATTORNEY GENERAL, STATE OF NEW YORK, ATTORNEY FOR DEFENDANTS. (J. JOSEPH MURPHY, ESQ., OF COUNSEL).

## M E M O R A N D U M

PITT, J.

Plaintiff's complaint sets forth three causes of action, to wit: (1) false arrest or false imprisonment, (these two causes of action being indistinguishable, the only distinction being in the maner in which they arise.)(2) malicious prosection, and (3) language suggestive of other torts such as invasion of privacy and/or abuse of process. The action was tried before the Court without a jury.

The Court of Appeals in reviewing the plaintiff's conviction found in part, as follows:

N.Y.S. Supreme Court Memorandum (App. 2)

"The information in this case nowhere states that the circumstances were such that the trooper was justified in suspecting that the defendant might be engaged or was about to engage in crime. Furthermore, the trooper's testimony indicated nothing more thenthat he observed the defendant walking along the public highway in an area in which there had been 'frequent burglaries'. Such testimony is clearly insufficient to establish any basis for a reasonable suspicion that the defendant might be engaged or was about to engage in crime ... it appears ... that the defendant was convicted for his failure to answer the trooper's questions concerning his destination and identity. While it may be true that there was no reason why the defendant should not have answered the trooper's questions, it equally is true that his failure to answer cannot constitute a criminal act and particularly, a violation of subdivision 6 of Sec. 240.35. ... The subdivision of a statute under which he was convicted contains clauses which are conjunctive, rather disjunctive, and in order to sustain a conviction under it, each of the conjunctive elements must be proved beyond a reasonable doubt... judgment should be reversed and the information dismissed," (People v. Schanbarger, 24 N.Y. 2nd 288, 300 N.Y.S. 2nd 100.)

This Court's factual findings upon trial are, as pertinent, identical to those treated by the Court of Appeals. I am, therefore, constrained to find the plaintiff's arrest and his resultant imprisonment were preformed and imposed unlawfully and with-

out probable cause. I must, therefore, grant judgment to the plaintiff upon the cause of action alleging false arrest and/or false imprisonment, as against the Defendant, Kellogg. The proof upon the trial clearly negated the plaintiff's claim that the Defendant, Cooper, was a co-actor in the events giving rise to these causes of action, and the complaint as to this defendant will be dismissed.

The Court finds the plaintiff's proof insufficient to support the remaining two causes of action, and as to the same the defendants' motions to dismiss will be grainted. In this connection a complete absence of proof of willfulness or maliciousness is found, the same being a necessary element of the cause of action for malicious prosecution. (See: Houghtaling v. State, 11 Misc 2d 1049.) There can be no recovery for malicious prosecution without evidence of actual malice.
Whether malice exists is a question of fact to be proved by the one asserting it, but an inference of malice may be drawn from a lack of probable cause. No showing of malice on the part of the officers has been made in this case, and a finding of malicious prosecution herein would be against the weight of the evidence.

To be noted also is the inappropriateness of a cause of action for the invasion of privacy, being in New York a purely statatory cause limited to the trade use of one's name, portrait or picture. (Section 51 Civil Rights Law).

While no items of specific damages were proved, by the plaintiff's testimony his

arrest and imprisonment caused him to suffer humiliation. This is uncontroverted and it is a reasonable finding of fact that the plaintiff suffered some degree of distress. The plaintiff testified his imprisonment to be of a 30 minute duration. The Defendant, Kellogg, estimated the same at no more than 35 minutes. The damages awarded must reasonably compensate the plaintiff for the indignity of being arrested and imprisoned and for the humiliation he suffered as a result of the arrest. Such damages, of course, are personal to the plaintiff, subjective in nature and difficult to assess. However, upon all of the proof I find that the plaintiff is to be awarded judgment upon the noted cause of action upon which he succeeded in the amount of $5000.00.

The foregoing shall constitute the decision of this Court. All trial motions inconsistent herewith are denied.

Submit accordingly.

Dated: Troy, New York.
December 27, 1972.

At a Trial Term of the Supreme Court of the State of New York held in and for the County of Rensselaer, at the Court House, in the City of Troy, New York, on the 9th day of January, 1973.

PRESENT: Hon. DeForest C. Pitt,
Justice, Supreme Court

STATE OF NEW YORK
SUPREME COURT
RENSSELAER COUNTY

| | | |
|---|---|---|
| DONALD SCHANBARGER, Plaintiff, | * | |
| -against- | * | JUDGMENT |
| ROBERT KELLOGG and PETER COOPER, Defendants. | * | Index # 99934 |

The above entitled action having duly come on for trial before the undersigned, without a jury, at a Trial Term of this Court held on the 20th and 21st days of November, 1972; and the parties having duly appeared, plaintiff having appeared pro se, and the defendants having appeared by Hon. Louis J. Lefkowitz, Attorney General of the State of New York, (J. JOSEPH MURPHY, Assistant Attorney General, of counsel) ; and the proofs of the plaintiff and defendants having been heard; and the Court duly made its opinion in writing; it is on motion

ORDERED AND ADJUDGED the complaint in the above entitled action be and the same hereby is dismissed on the merits as to the Defendant, Peter Cooper, and it is further

ORDERED AND ADJUDGED that the second and third causes of action of the complaint in the above entitled action, alleging a cause of action for malicious prosecution and other torts such as invasion of privacy and/or abuse of process, be and the same hereby are dismissed as to the Defendant, Robert Kellogg, and it is further

ORDERED AND ADJUDGED that the plaintiff is entitled to and he hereby is awarded judgment against the Defendant, Robert Kellogg, upon the first cause of action contained in the complaint herein, to wit; that cause of action alleging false arrest or false imprisonment in the sum of Five Thousand ($5,000.00) Dollars, and it is further

ORDERED AND ADJUDGED that the plaintiff, Donald Schanbarger, do recover of the Defendant, Robert Kellogg, the sum of Five Thousand ($5,000.00) Dollars together with costs and disbursements as provided for by statute and to be taxed by the Clerk, and that the said plaintiff have execution therefore.

ENTER:

Dated: January 9, 1973.

/s/ DeForest C. Pitt
Justice, Supreme Court

21960

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

DONALD SCHANBARGER,
Appellant-Respondent,

-against-

ROBERT KELLOGG,
Respondent-Appellant,

-and-

PETER COOPER,
Defendent.

Argued, December 11, 1973.

Before:
HON. J. CLARENCE HERLIHY,
Presiding Justice,
HON. ELLIS J. STALEY, JR.,
HON. LOUIS M. GREENBLOTT,
HON. MICHAEL E. SWEENEY,
HON. ROBERT G. MAIN,
Associate Justices.

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CROSS APPEALS from a judgment of the Supreme Court (DeForest C. Pitt, J.), entered January 15, 1973 in Rensselaer County, upon a decision of the court at a Trial Term, without a jury, in favor of plaintiff.

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DONALD SCHANBARGER, appellant-respondent in person, Salem, New York 12865.

LOUIS J. LEFKOWITZ, Attorney-General (Peter Joseph Dooley and Ruth Kessler Toch of counsel), for respondent-appellant, The Capitol, Albany, New York 12224.

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OPINION FOR AFFIRMANCE

GREENBLOTT, J.

These are cross appeals from a judgment of the Supreme Court, entered January 15, 1973 in Rensselaer County, upon a decision of the court at a Trial Term, without a jury, in favor of plaintiff.

State Troopers Kellogg and Cooper were on routine patrol in Rensselaer County during the early morning hours of April 30, 1968. At about 3:00 A.M., they first observed the plaintiff walking along a highway through a residential area carrying a paper shopping bag. Approximately a half-hour later, while patrolling further along the same highway, the troopers again observed the plaintiff still walking in the same direction, but now in the vicinity of the East Greenbush Shopping Center. Trooper Kellogg stopped the car and asked the plaintiff where he was going, where he was coming from, his identity and where he resided. Plaintiff replied that he did not think he had to answer those questions

and refused to do so, even though Trooper Kellogg informed him that his refusal to answer could result in an arrest for loitering. The plaintiff was then arrested.

Trooper Kellogg then handcuffed the plaintiff and searched the bag he was carrying. A New York State Identification and Intelligence System report requested at the time by Trooper Kellogg later revealed that the plaintiff had no criminal record, and was an attendent at Wassaic State School. Within 15 minutes of his arrest, plaintiff was taken beforea town Justice by Trooper Kellogg. An information charging loitering was filed and the plaintiff was arrainged, pleaded not guilty to the charge and posted $20 bail.

The loitering charge was prosecuted by the Rensselaer County District Attorney who requested a court ordered psychiatric examination of the plaintiff. When the plaintiff was found capable of understanding the charge against him, and of particating in his own defense, the matter proceeded to trial in Justice Court where the plaintiff defended himself. He was found guilty and fined $10. He appealed to the Rensselaer County Court and the conviction was affirmed.

On further appeal to the Court of Appeals the conviction was reversed. (People v. Schanbarger, 24 N Y 2d 288.) Plaintiff subsequently brought this civil action against the State Troopers, the prosecutor

and the psychiatrist, which resulted in an earlier dismissal of the complaint against the prosecutor and the psychiatrist, and now has resulted in a dismissal of all causes of action against defendant Trooper Peter Cooper, who was present at the time of the arrest but who took no part in the arrest nor subsequent proceedings. The causes of action for malicious prosecution, invasion of privacy and abuse of process against defendant Trooper Kellogg were also dismissed but the plaintiff was awarded judgment for false arrest against Trooper Kellogg in the sum of $5,000.

Trooper Kellogg here contends that plaintiff's arrest for loitering was reasonable under the circumstances. It is obvious that the plaintiff did absolutely nothing to justify a "suspicion that he may be engaged or (was) about to engage in crime" (Penal Law, Sec. 240.35, subd. 6). He was observed merely walking along a major highway, steadfastly in one direction. With one element of the offense left totally unsubstantiated, it cannot be said that the officer had reasonable grounds to believe that the plaintiff was loitering.

Trooper Kellogg next contends that the plaintiff's own conduct contributed to his arrest since he refused to answer Kellogg's simple questions. However, the Court of Appeals has held that plaintiff's failure to answer the trooper's questions cannot constitute a criminal act (People v.

Schanbarger, supra, at 291-292).

The dismissal of the causes of action for malicious prosecution, invasion of privacy and abuse of process against defendant Kellogg and the dismissal of all causes of action against defendant Cooper should be affirmed. It is clear from the record that Trooper took no part in the arrest and questioning of the plaintiff. The cause of action for invasion of privacy against Trooper Kellogg was correctly dismissed since to the extent that respondent's privacy was "invaded" it was done so by the actionable false arrest and therefore any award of damages for such an invasion would be duplicative of the damages awarded for the false arrest. The cause of action for malicious prosecution on the part of Trooper Kellogg was also correctly dismissed, since there was no evidence of any personal hatred or ill will on the part of the trooper. The cause of action for abuse of process was likewise correctly dismissed.

The only serious question that remains in the case is whether the award for damages of $5,000 was excessive. The Fourth Department has held that when an individual is arrested by a police officer without a warrant, liability for a false arrest extends only from the time of arrest to the time of arraignment (Casler v. State of New York, 33 AD 2d 305). The Fourth Department cited no authority for this proposition and we cannot agree with this result.

In De Bonis v. State of New York (37 A D 2d 878) we upheld an award of damages of $5,000 where the plaintiff had been falsely arrested and subjected to considerable adverse publicity, but was not indicted. While the adverse publicity towhich the present respondent was subjected may not have been as great as in De Bonis, the mental strain and inbarrassment, to say nothing of the cost in time and money, of having to defend oneself in three criminal courts over a period of years is an ordeal which should be no less subject to compenstion. In fact, there would appear no good reason for holding to the contrary, since a criminal prosecution with its attendant damages is no less a foreseeable consequence of an arrest than is adverse publicity and its attendant damages. Indeed, it is fair to suggest that a police officer in the normal course of events expects and intends a prosecution to flow from an arrest, whereas publicity is a consequence with which he might not be concerned. We are therefore of the view plaintiff should be permited to recover for all the damages which reasonably resulted from the false arrest. Here, plaintiff was forced to undergo a trial in Justice Court at which he was found guilty, an appeal to the Rensselaer County Court, where his conviction was affirmed, and a subsequent appeal to the Court of Appeals, where he won a reversal. He properly argues that he was subjected to a great deal of unfavorable publicity

throughout the entire proceeding. Furthermore, he was subjected to a psychiatric examination which involved a certain amount of embarrassment. He points out that the stigma of this arrest remains a problem with him in his efforts to obtain a job. Under the circumstances, we do not feel that the award of $5,000 by the trial court is excessive.

The judgment should be affirmed, with costs to appellant Schanbarger.

Supreme Court—Appellate Division
Third Judicial Department

January 31, 1974. 21960

DONALD SCHANBARGER, Appellant-Respondent,
v.
ROBERT KELLOGG, Respondent-Appellant,
and
PETER COOPER, Defendant.

Judgment affirmed, with costs to appellant Schanbarger.

Opinion per GREENBLOTT, J.

HERLIHY, P.J., STALEY, JR., SWEENEY and MAIN, JJ., concur.

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 10th day of December, 1973.

PRESENT:

HON. J. CLARENCE HERLIHY,
Presiding Justice,
HON. ELLIS J. STALEY, Jr.,
HON. LOUIS M. GREENBLOTT,
HON. MICHAEL E. SWEENEY,
HON. ROBERT G. MAIN,
Associate Justices.

| | |
|---|---|
| DONALD SCHANBARGER,<br>Plaintiff-Appellant-Respondent,<br><br>-vs-<br><br>ROBERT KELLOGG,<br>Defendant-Respondent-Appellant,<br>-and-<br>PETER COOPER,<br>Defendant-Respondent. | ORDER<br><br>County Clerk's Index No. 99934 |

Donald Schanbarger having appealed from a judgment of the Supreme Court of Rensselaer County, entered on the 15th Day of January, 1973, in the office of the Clerk of the County of Rensselaer and Robert Kellogg having cross-appealed from said judgment, and said appeals having been presented during the above-stated term of this Court, having been argued by Donald Schanbarger, the appellant, and by

Hon. Louis J. Lefkowitz, (Peter Joseph Dooley and Ruth Kessler Toch of counsel) Attorney-General of New York State, for respondent-appellant Robert Kellogg and defendant-respondent Peter Cooper, and after due deliberation, the Court having rendered a decision (opinion per Greenblott, J.) on the 31st day of January, 1974 it is hereby

ORDERED that the judgment so appealed from be, and the same hereby is, in all things, affirmed, with costs to the appellant Donald Schanbarger.

JOHN J. O'BRIEN

Clerk

ENTER:

DATED AND ENTERED: February 27, 1974
A TRUE COPY
/s/ John J. O'Brien
CLERK

STATE OF NEW YORK
COURT OF APPEALS

3 No. 253
Kenneth Gerald Broughton, as father and Natural guardian of Susan Margaret Broughton,
Respondent,
vs.
The State of New York,
Appellant.

O P I N I O N

This opinion is uncorrected and subject to revision before publication in the New York Reports.

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3 No. 226
Donald Schanbarger,
Appellant-Respondent,
vs.
Robert Kellogg,
Respondent-Appellant
and
Peter Cooper,
Defendent.

WACHTLER, J.:

These appeals, both involving actions for false imprisonment. present questions as to the applicability of the prima facie rule and the extent of compensable damages. Since both cases have been before our Court previously in the context of criminal appeals, only a cursory review of the facts is necessary. (See, People v. Broughton, 30 A D 2d 813, aff'd. 23 N Y 2d 809; People v. Schanbarger, 24 N Y 2d 288.)

On the evening of November 14, 1967 Susan Broughton was a visitor in a mobile home leased to certain other parties. She

wasarrested by police officers who, while searching the trailer pursuant to a search warrant, found several pounds of marijuana secreted throughout the premises. Respondent was then brought to the Stony Point Barracks where she was fingerprinted, photograghed and subjected to a full body search. Thereafter she was indicted for criminal possession of a dangerous drug in the first degree (former Penal Law Sec. 220.20).

Subsequently the evidence was suppressed on the ground that the search warrant affidavit was insufficient as a matter of law and in a related proceeding the indictment was dismissed. There the county court found "not a scintilla of evidence" connecting Broughton with the criminal activity. The instant action was commenced and following a bifurcated nonjury trial, claimant was awarded damages for "lost wages, mental anguish, humiliation and anxiety" togethe with a sum for legal services rendered in her defense. The Appellate Division affirmed this judgment.

The second case before us involves a false arrest claim by Donald Schanbarger against the state trooper who arrested him. As Schanbarger was walking along an East Greenbush road in the early morning hours of April 30, 1968, he was stopped by a trooper and questioned as to his identity and destination. When respondent refused to answer he was arrested for loitering (former Penal Law Sec. 240.35 subd. 6). He was tried before a Justice of the Peace in East Greenbush and convicted. The county court of Rensselaer



County affirmed this judgment. On appeal to our Court we concluded that the testimony of the trooper was "clearly insufficient to establish any basis for a reasonable suspicion that the defendant might be engaged or was about to engage in crime" and the judgment was reversed (People v. Schanbarger, 24 N Y 2d 288, 291). (emphasis in original)

Following his exoneration Schanbarger instituted this action against the trooper alleging several causes of action including one for false arrest. After a nonjury trial in Supreme Court, Rensselaer County, judgment was granted to Schanbarger on the false arrest action "for the indignity of being arrested and imprisoned and for the humiliation he suffered as a result of the arrest." Both parties appealed to the Appellate Division which affirmed the judgment in favor of Schanbarger (Schanbarger v. Kellogg, 43 A D 2d 362

Both appellants assert the prima face rule as grounds for reversal. In Broughton the claim is made that reasonable cause to beleive she had committed a crime should be presumed by virtue of her arraignment and subsequent indictment by the grand jury. Similarly, in Schanbarger the appellant contends that the arraignment constituted a judicial recognition of probable cause to arrest which should generate a presumption in a subsequent action for false arrest. A corollary of the prima face rule is that the presumption is rebuttable only where the plaintiff establishes fraud, perjury or the

misrepresentation or falsification of evidence. It is our view that the prima facie rule applies only in causes of action for malicious prosecution and is totally misplaced when applied in false imprisonment actions.

Our conclusion is found on the common-law distinctions between malicious prosecution and false imprisonment. Although these are kindred actions, each protects a different personal interest and is composed of different elements. Unfortunately, in cases where both false imprisonment and malicious prosecution are alleged, the opinions fail to differentiate between these torts thereby generating confusion as to the pertinency of malice and want of probable cause. (See, e.g., Langley v. City of New York, 40 A D 2d 844, aff'd. 34 N Y 2d 885; Schultz v. Greenwood Cemetery, 190 N.Y. 276. See generally, Prosser, Torts (4th ed) Sec. 11; Anno: False Imprisonment: Liability of private citizen for false arrest by officer, 21 ALR 2d 643.) A careful analysis of the purpose and elements of the respective torts illustrates the distinct nature of each and the inapplicability of the prima facie rule in false imprisonment cases. (Compare Prosser, Torts (4th ed), False Imprisonment Sec. 11 with Malicious Prosecution Sec. 119; Alexander, The Law of Arrest, Imprisonment, Ch. 26 with Abuse of Process, Ch. 25.)

The action for false imprisonment is derived from the ancient common-law action of trespass and protects the personal interest of freedom from restraint of



movement. Whenever a person unlawfully obstructs or deprives another of his freedom to choose his own location, that person will be liable for that interference (Restatement of Torts 2d, Sec. 35, comment (h)). To establish this cause of action the plaintiff must show that: (1) the defendant intended to confine him, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement and (4) the confinement was not otherwise privileged (Restatement of Torts 2d Sec. 35; but see Prosser, Torts, supra, & 11, which rejects the requirement that the plaintiff must be conscious of the confinement). The great weight of authority, including New York, recognizes the rule that neither actual malice nor want of probable cause is an essential element of an action for false imprisonment (Marks v. Townsend, 97 N.Y. 598; Annots: Malice and want of probable cause as element or factor of action for false imprisonment, 19 ALR 671; 137 ALR 504; 22 Am. Jur., False Imprisonment, Sec. 27). This is in direct contrast with the elements comprising a malicious prosecution action.

The tort of malicious prosecution protects the personal interest of freedom from unjustifiable litigation (Prosser, Torts (4th ed) Sec. 119; Anno: False Imprisonment; liability of private citizen for false arrest by officer, 21 ALR 2d 643). The essence of malicious prosecution is the preversion of proper legal procedures. Thus, it has been held that some sort of prior judicial proceeding is

the sine qua non of a cause of action in malicious prosecution (Al Raschid v. News Syndicate Co., 265 N.Y. 1) Such a judicial proceeding may be either an evaluation by a magistrate of an affidavit supporting an arrest warrant application, or an arraignment or an indictment by a grand jury. The elements of the tort of malicious prosecution are: (1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the accused, (3) the absence of probable cause for the criminal proceeding and (4) actual malice (Prosser, Torts (4th ed.) Sec. 119). Where plaintiff institutes a malicious prosecution action he must plead the lack of probable cause (Anno: Malicious Prosecution - Probable Cause, 14 ALR 2d 272). A contrary rule would be against public policy as tending to discourage prosecutions for crime or the vindication of civil rights. Dispite the clear and fundamental differences between malicious prosecution and false imprisonment, the concepts are easily intermingled in the arrest situation.

The distinction between false imprisonment and malicious prosecution in the area of arrest depends on whether or not the arrest was made persuant to a warrant. As noted in the Restatement 2d, an unlawful detention gives rise to a cause action for false imprisonment "exceptof where the confinement was by arrest under a valid process issued by a court having jurisdiction" (Restatement of Torst 2d, Sec. 35, comment (a); Prosser, Torts (4th



ed.) Sec. 11). When an unlawful arrest has been effected by a warrant an appropriate form of action is malicious prosecution. This distinction is critical not only because it affects the allegations and proof but also because it brings the prima facie rule into operation.

Essentially this rule recognizes the prima facie validity of actions where there has been a judicial evaluation. Accordingly, the magistrate's consideration of the arrest warrant application will generate a presumption that the arrest was issued on probable cause. However, this reasoning is not applicable where the arrest is made without a warrant.

Whenever there has been an arrest and imprisonment without a warrant, the officer has acted extrajudicially and the presumption arises that such an arrest and imprisonment are unlawful (Smith v. County of Nassau, 34 N Y 2d 18, 23; Woodson v. New York City Housing Auth., 10 N Y 2d 30,33; Cicurel v. Mollet, 1 A D 2d 239, 241, aff'd 1 N Y 2d 797; Bonnau v. State of New York, 278 App. Div. 181, 182, aff'd 303 N.Y. 721; Clark v. Nannery, 292 N.Y. 105, 108; Schultz v. Greenwood Cemetery, 190 N.Y. 276,279). The cases uniformly hold that where the arrest or imprisonment is extrajudicial, that is, without legal process or color of legal authority, it is not necessary to allege want of probable cause in a false imprisonment action (Brown v. Chadsey, 39 Bab.(NY) 253; Anno: Malicious Prosecution - Probable Cause, 14 ALR 2d 272). Indeed, the burden is on the defendant to prove the opposite (Snead

v. Bonnoil, 166 N.Y. 325).

As a matter of pleading the defendant has the burden of proving legal justification as an affirmative defense and the defendant will be precluded from introducing such evidence under a general denial (Woodson v. New York City Housing Authority, 10 N Y 2d 30; Peterson v. N.Y. Consolidated R. Co., 230 N.Y. 566). Justification may be established by showing that the arrest was based on probable cause. After the fact judicial participation cannot validate an unlawful arrest; only probable cause existing at the time of arrest will validate the arrest and relieve the defendant of liability. We would note however that evidence of a subsequent arraignment or indictment is admissible as some proof of the presence of probable cause. Moreover, a conviction which survies appeal would be conclusive evidence of probable cause. On the other hand, evidence of a subsequent dismissal, acquittal or reversal on appeal would also be admissible to refute the affirmative defense of justification.

It should be noted that the defendant's motives are immaterial to the question of liability. A valid arrest will not be rendered unlawful by malicious motives (Sleight v. Ogle, 4 E.D. Smith(N.Y.) 445) nor will good faith rectify an otherwise unlawful arrest (Smith v. County of Nassau, 34 N Y 2d 18). Significantly, however, proof of good faith is relevant to the mitigation of damages and where established may result in nominal damages only (Gill v. Montgomery Ward & Co., 284 App.

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Div. 36).

Applying these principles to the instant cases we find no reason to disturb the holdings below as to liability. In both cases the presumptive unlawfulness of the warrantless arrest coupled with the plaintiff's evidence of intentional, unprivileged, nonconsensual confinement by the defendants were sufficient to establish the tort of false imprisonment. Nor did proof offered by the defendants establish justification as an affirmative defense. Having disposed of the liability aspect we need only consider the question of damages.

The appellant in Broughton argues that the respondent should not have been awarded the amount expended for legal services because they were too remote. The State reasons that damages for false arrest should be limited to the period before arraignment since after arraignment the accused is no longer held as a result of the arrest but as a result of the intervening act of the arrigning magistrete (see, Caster v. State, 33 A D 2d 305; Gearitz v. Strasbourger, 133 App. Div. 701). This position was adopted by our court in Worden v. Davis (195 N.Y. 391).

Where a plaintiff successfully establishes liability for false imprisonment his damages will be measured only to the time of arraignment or indictment whichever occurs first. Those damages will not include attorney's fees expended in the subsequent defense of the criminal prosecution (cf. Worden v. Davis, supra, at 395). Such damages are properly at-

tributable to the tort of malicious prosecution. The reason for this rule is that an action for false imprisonment redresses the violation of plaintiff's freedom of movement and not freedom from unjustifiable litigation, therefore attorney's fees are not proximate after arraignment or indictment and hence not recoverable. Where malicious prosecution has not been alleged or established the plaintiff will be limited to those legal fees incurred up to and including the evaluation by a neutral body that the charges are warranted. Consequently in Broughton the matter will have to be remitted to the trial court in order to ascertain the damages limited as they must be to the time she was falsely imprisoned and not extending beyond the time of arraignment.

Applying the reasoning of Worden, supra, to the second appeal we find no error. Having represented himself, Schanbarger did not recover any legal fees. There the trial court awarded damages for mental anguish and humiliation stemming from the arrest. This was proper in that it only recompensed him for those damages proximately related to the tort and did not extend beyond the arraignment. The Appellate Division affirmed this award and we do not consider the same excessive as a matter of law.

Accordingly, the order of the Appellate Division in Broughton should be modified by remitting the case to the Court of



Claims for a determination of the amount of damages in accordance with this opinion and as so modified affirmed. The order of the Appellate Division in Schanbarger should be affirmed.

* * * * * *

In Broughton v. State of New York:
Order modified, without costs, and the case remitted to the Court of Claims for further proceedings in accordance with the opinion herein and, as so modified, affirmed. Opinion by Wachtler, J. All concur. Cooke, J., taking no part.

In Schanbarger v. Kellogg:
On plaintiff's appeal: Appeal dismissed, without costs, upon the ground that no substantial constitution question is directly involved.
On defendant's appeal: Order affirmed, without costs. Opinion by Wachtler, J. All concur. Cooke, J., taking no part.

Decided July 10, 1975

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 6th day of May in the year of our Lord one thousand nine hundred and seventy-five, before the Judges of said Court.

WITNESS,

The HON. CHARLES D. BREITEL,
Chief Judge, Presiding.

Joseph W. Bellacosa, Clerk.

Remittitur July 10, 1975.

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3 No. 226 74

Donald Schanbarger,
Appellant-Respondent,
vs.
Robert Kellogg,
Respondent-Appellant
and
Peter Cooper,
Defendant.

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BE IT REMEMBERED, That on the 18th day of July in the year of our Lord one thousand nine hundred and seventy four Donald Schanbarger the appellant/Respondent in this cause, came here unto the Court of Appeals, by Donald Schanbarger,





pro se attorney, and filed in the said Court a Notice of Appeal and return thereto from the Order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Robert Kellogg the respondent/Appellant in said cause, afterwards appeared in said Court of Appeals by Louis J. Lefkowitz, Atty Gen. S,N.Y.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Peter J. Dooley, of counsel for the respondent-appellant, and by Mr. Donald Schanbarger, pro se, for appellant-respondent, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that on plaintiff's appeal: Appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved. On defendant's appeal: order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs. Opinion by Wachtler, J. All concur. Cooke, J., taking on part.

And it was also futher ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that on

plaintiff's appeal: Appeal dismissed, etc.
On defendant's appeal: Order affirmed, etc.,
AS AFORESAID.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

/S/ Joseph W. Bellacosa
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE, )
Albany, July 10, 1975. )

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(S E A L)

/S/ Joesph W. Bellacosa
Clerk.